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IN THE

Supreme Court of The United States

OCTOBER TERM, 1934

No. 5

THE CITY OF WACO, TEXAS, Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, ET AL., Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT, CURTIS BOGGS

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Curtis Boggs.

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STATEMENT OF THE CASE

The respondent, Curtis Boggs, plaintiff in the trial court, would respectfully show to this Honorable Court, that he does not accept in full the statement of petitioner as contained in its application for writ of certiorari, pages 1-4, and desires to qualify same and add thereto.

There are two printed transcripts of the record filed herein, with the pages numbered differently, one omitting matters that are contained in the other.

We will refer to the first filed as "original record" and to the second or reprinted one as "record" to avoid confusion.

The petition for removal in the State court came on for hearing (original record p. 3) and while the hearing was in progress and before the State court rendered a decision as to whether or not it would be removed, and as to whether or not the cross-defendant United States Fidelity & Guaranty Company would be permitted to remain in the case as a party, the petitioner obtained its transcript of the record and filed same in the U. S. District Court. (Orig. R. pp. 40-41)

The complete record in the State court is not shown. It is not shown when the transcript was filed in the United States District Court. Copy of the bond which is relied upon and referred to throughout the petitioner's brief and application is not shown of record, although same was before the trial court. The only reference to the wording of the bond as contained in the record is an allegation as to part of what it contained in the pleadings filed below (R. 12-13) which allegation was denied by the bonding company. (R. 24) So far as the record is concerned, it is as much shown that there was no such bond, or that the bond, if any, contained no such provisions as alleged by petitioner, as it is shown otherwise.

The trial court held there was a separable controversy (R. 27) with the bond before him, which holding is sought to be sustained and is specially approved by petitioner, and which holding is inconsistent with any theory whereby the bonding company could be retained as a party in the State court as a matter of right.

With the record in this shape, the trial court held that the petitioner did not have a right to hold the bonding company in the case, when to do so might destroy the jurisdiction of the state court, unreasonably hinder and delay the trial of the cause there, which was entirely separable, and which would confuse the issues there as drawn between a citizen of Texas in his suit against other citizens of Texas. (R. 26-28)

SUMMARY OF ARGUMENT

Respondent will present his argument in favor of an affirmance of the holding of the United States District Court, based upon the following summary:

1. It is necessarily a part of petitioner's contention, as well as its expressed view, in order to sustain jurisdiction in the United States Court, that its controversy with the bonding company is wholly separable from, and not contingent upon, plaintiff's cause of action against it, and that there is no privity of contract between the plaintiff and the bonding company. This being true, it has no right, as a matter of law, to litigate such separable controversy in such manner as to delay the plaintiff's action against it, and so as to destroy the jurisdiction of the State court, and so as to inject into the original action matters which will confuse the issues as drawn therein and make it difficult to assess the costs in proper manner.

2. The only evidence in the record that petitioner had any sort of contract with the United States Fidelity & Guaranty Company being an allegation by petitioner that "the United States Fidelity & Guaranty Company executed and delivered to this defendant its obligation

agreeing and binding itself to hold this defendant harmless from any claim growing out of or connected with any act of the defendants, Combs & Glade, as set out in plaintiff's petition," (R. 12-13) which allegation was answered by the said guaranty company first by an exception as to its sufficiency, and second, by an express denial of said allegation (R. 24), and the trial court, with the alleged bond before him, having found that "as to plaintiff's cause of action, the United States Fidelity & Guaranty Company is an unnecessary and improper party, and that plaintiff's motion to dismiss as to the United States Fidelity & Guaranty Company should be granted," such holding, in the absence of a record showing that the trial court erred in his ruling, should be sustained.

3. Under the decisions of the highest court of the State of Texas, the right to interplead an indemnitor by a defendant who has been sued upon a separable cause of action, being a matter of discretion of the trial court, the United States District Court had the same right of discretion, and its order should be sustained in the absence of a showing of abuse of discretion.

4. This being an effort of petitioner to have reviewed in an indirect manner an order of remand to the State court, same is in contravention of U. S. Code.

5. It not being shown of record when the transcript from the State court was filed in the United States District Court, there is nothing upon which to base a specification of error that motion to dismiss the guaranty company was not filed in limine.

6. The motion to dismiss the guaranty company having been seasonably filed in the State court, and having

become a part of the transcript transferred to the United States court, same became part of the pleading in the United States court, and it was not necessary to refile same in said court.

7. A misjoinder of unnecessary parties in such manner as to unreasonably burden and confuse the plaintiff in his action against the original defendant, may be raised by plea in abatement, demurrer or special exception, and it is not necessary that same should be sworn to, or the trial court may, of its own accord, refuse to grant leave for the filing of an action over against third parties under a separable controversy.

ARGUMENT

Answering Points One and Two of Petitioner's Brief

Petitioner relies upon the case of National Surety Co. vs. Atascosa Ice, Water & Light Company, (Tex. Comm. App.) 273 S. W. 821. It will be noted that the Supreme Court did not adopt the opinion in that case, but only adopted the judgment which means that the case is not to be officially reported or considered as an authority. Rev. Stat. Texas 1925-Art. 1790; Hager vs. Stokes, 294 S. W. 835, 838 Par. 1; 116 Tex. 453.

The following excerpts from that opinion show that it is not analogous case to the case at bar:

> "the policy in suit was not only for the benefit of the bank, but expressly also for the benefit of any one else damaged by reason of such wrongful withdrawal of funds," * * * "and also its depositors." There was a privity of contract expressly provided for in this case."

It quotes with approval from the Supreme Court of Texas as follows:

> "It should be observed that Judge Williams held that the joinder in the Fossati Case would prejudice the rights of the parties. Where that is true, under the Skipworth case, and all others, no joinder would be authorized. Judge Brown clearly shows that in his opinion."

The existence of the right of a defendant in all cases to implead other parties who might become liable to him as a result of a judgment against him, regardless of other considerations, has been expressly negatived by an unbroken chain of authorities by the Supreme Court of Texas, cited with approval in United States Fidelity & Guaranty Co. vs. Fosatti, 80 S. W. 74, 97 Tex. 497.

The simple pleading by the petitioner that a surety company had agreed to hold it harmless from plaintiff's claim in the court below, without showing that the contract was in force at the time of the trial, and the various terms and conditions of the bond, with its many exceptions, was not a sufficient pleading, in the face of a demurrer, and when these alleged facts were specially denied by the bonding company, the denial, as a pleading, had as much force as the allegation of the existence of the bond. Petitioner does not bring up a record showing the offering of evidence, and, therefore, in this state of the record, the trial court had as much right to say there was no bond, as alleged, and in terms as alleged, as he had to say there was such a bond. The fact was, the court had the bond before him, and held that there was no such connection between its obligations and those of the City of Waco to plaintiff, as to authorize the city to hold the bonding company in

the case. By reason of the failure of the petitioner to include the bond in the record or to offer some proof, the burden being upon it after the denial was filed, it is not in position to even so much as claim that it had a bond, much less to have this honorable court draw conclusions as to its provisions. The trial court acted entirely within his province in adopting the denial as to the conditions of the bond rather than the petitioner's allegation, even in the absence of any evidence. Wabash Ry. Co. vs. Lindley, 29 Fed. (2) 829 1. c. 821. And realizing that a sharp issue was to be drawn as to the existence of the bond and as to the effect of its provisions and limitations, if it was in force, the court certainly had the right to say that plaintiff's action in tort should not be incumbered with such issues.

Petitioner admits in its brief (Point 2, Page 13) that "in actions at law, the Federal courts follow the State practice with respect to the joinder of causes of action." Under the state practice, where the controversy is entirely separable, it is purely a matter of the discretion of the trial judge as to whether or not a defendant may be permitted to interplead an indemnitor. National Surety Co. vs. Atascosa Ice, Water & Light Co. 273 S. W. 821 1. c. 824, quoting with approval authorities of the Supreme Court of Texas.

So far as this record discloses, the trial court may have concluded that there was collusion between the petitioner and the bonding company to obtain Federal court jurisdiction, and if pleadings shall be considered as evidence upon which the court might act, which is all that petitioner offers, then there was ample evidence of such collusion in the contest of the petition for removal (R.

21-23), and the footprints of said two parties acting in complete harmony so far as the question of jurisdiction is involved. This is almost conclusively found in the effort of petitioner to maintain Federal jurisdiction, although it was the bonding company which filed the petition and bond for removal, and the complaint of the bonding company against the judgment of the District Court. (Original R. 75).

What is said in U. S. F. & G. vs. Fossati, supra, is equally applicable to the case at bar, viz:

> "In order to enforce in this case the right contended for by the appellees, it would be necessary to hold, without qualification, that in all cases where a judgment against a defendant might give rise to a cause of action in his favor against another, he is entitled as a matter of right, to bring that other into the case. This court has never so held."

In contemplating the results of such a ruling, we may see that a citizen of Texas might have a more or less impecunious indemnitor in the State of Indiana, who would agree to hold him harmless against all of his losses and damages and contracts, and thus the entire mass of all litigation could be poured into the Federal courts, and the state courts effectively deprived of all jurisdiction, and the decision could be used as a vehicle for fraud and oppression especially in localities where courts do not meet very often. The petitioner's contention is that any and all contracts of indemnity, regardless of equities, delays, interference in the orderly proceedings of the courts and the confusion of issues, as a matter of right, where diversity of citizenship exists, entitles the indemnitor to be brought in and in turn to transfer the cause to the Federal court.

We think it is plain to be seen, that the real purpose of petitioner is to maintain jurisdiction of the Federal court, in the face of an order of remand, and if pleadings be evidence, as contended by petitioner, there is ample evidence of this fact in the contest of the petition for removal (R. p. 21-23) wherein it is shown that in a similar case where the same bond, covering the same Combs & Glade was involved, before the same Federal judge, but where jurisdiction was not at stake, no effort was made to bring the bonding company into the case. If this be an effort, indirectly, to appeal from an order of remand, same is effectively barred by the U. S. Code. City of Waco vs. U. S. Fidelity & Guaranty Company, 67 Fed. (2) 785, and the cases there cited.

Answering Point Three of Petitioner's Brief

Article 2010 Sec. 5, Rev. Stat. Tex. 1925, which is the same article numbered 1906 and 1265, respectively, of former revisions of Texas statutes, refers only to a plea raising the question of a defect of necessary parties, and has no bearing whatever on an exception to the joinder of an unnecessary party. Commercial Bank of Chicotah vs. First State Bank & Trust Co. of Santa Anna et al. 153 S. W. 1175, 1. c. par. 1, p. 1176. Defect of parties does not mean misjoinder of parties. Faddler vs. Gabbert, 63 S. W. (2) 127, par. 1.

Answering Point Four of Petitioner's Brief

It has been shown that it is not a matter of right that a party defendant may interplead his indemnitor, and when he undertakes to do so, the court may of his own motion refuse to permit same, or the question may be raised by

a motion to dismiss, or even by demurrer, (Frey vs. Ft. Worth & Rio Grande Ry. Co. (Sup. Ct.) 25 S. W. 609, 86 Tex. 465), or by special exception or plea in abatement. (Fidelity Union Casualty Co. vs. Riley, 26 S. W. (2) bottom page 685, top page 686). Petitioner is effectually barred from raising the question on appeal for the following reasons:

a. It did not except to the manner in which the motion to dismiss was raised in the court below.

b. It complains only of the time at which the motion was filed, whereas it was originally filed on June 9, 1932, (Filemark, R. 21) (Prayer for dismissal, R. 23, par. 5 et seq.) which was two days after notice to this respondent was served on his attorneys, (R. 17) and less than thirty days after the bonding company was made a party. (R. 12).

c. The record does not disclose when the transcript from the State Court was filed in the Federal Court, the file mark having been omitted from the record, and, therefore, there is nothing to show at what time the renewed motion in the Federal Court was filed with reference to the time when the transcript was filed there.

d. The motion to dismiss was properly considered by the court, on the record as brought from the State court, and the court could have entered his order of dismissal and remand of his own motion. Wabash Ry. Co. vs. Lindley, 29 Fed. (2) 829.

e. The effort to raise for the first time on appeal the question as to the regularity of the filing of the motion to dismiss the bonding company falls within the inhibitions

of the technicality Act of Congress, and does not affect the substantial rights of petitioner, and the matter will be considered waived for failure to present same in the trial court. (U. S. C., Title 28, Sec. 391; Jud. Code, Sec. 269). Lauderdale Co. vs. Kittel, 229 Fed. 593, par. 3; Monument Pottery Co. vs. Imperial Coal Corp. (C. C. A. N. J.) 21 Fed. (2) 683, certiorari denied 48 Sup. Ct. 213, 276 U. S. 618, 72 L. Ed. 734.

CONCLUSION

The respondent, Curtis Boggs, respectfully shows to the court that he has no controversy save with a citizen of Texas; that he has been delayed now for years; that the ruling of the United States District Court is just, and he urgently requests that same be in all things affirmed.

Respectfully submitted,

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TOM P. SCOTT,
of Counsel for
said Respondent.